(1)

91-1014

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL LACHTERMAN,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether evidence seized as a result of a search pursuant to a search warrant should have been suppressed because of the following Fourth Amendment violations:

a) The authorization to seize "pornographic material, controlled substances, and instrumentalities of the crime of sodomy" was too general and provided no guidelines to the officers as to what could be seized;

b) Even if a search for "controlled substances" was properly authorized, it was improper to seize non-drug items, which do not constitute evidence of criminal activity and the possession of which is not illegal;

c) The application and affidavit for the search warrant did not provide probable cause because there was no information as to reliability of sources of information;

d) The application and affidavit failed to disclose any dates as to when criminal events allegedly occurred or when the sources or the officer making the affidavit secured their information, contrary to *Sgro v. United States*, 287 U.S. 206 (1932).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

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Petitioner, Michael Lachterman, prays that a Writ of Certiorari issue to the Missouri Court of Appeals, Eastern District, to review the opinion and judgment of said Court affirming his conviction.

OPINIONS BELOW

This cause was decided by a three-judge panel of the Missouri Court of Appeals, Eastern District, on May 28, 1991, in an opinion which affirmed a conviction of petitioner in the Circuit Court of the City of St. Louis, Missouri, on two counts of sodomy in violation of § 566.060 of the Revised Statutes of Missouri.

The opinion of the Court of Appeals is reported in *State v. Lachterman*, 812 S.W.2d 759 (Mo. App. 1991), and is reproduced as Appendix A hereto.

On July 23, 1991, the Court of Appeals denied petitioner's motion for rehearing and application to transfer the case to the Supreme Court of Missouri. This order has not been officially reported and is reproduced as Appendix B hereto.

Thereafter, pursuant to Missouri Supreme Court Rule 83.03, petitioner filed an application with the Supreme Court of Missouri to transfer the cause to the Supreme Court. On September 10, 1991, the Supreme Court of Missouri entered an order denying petitioner's application to transfer the cause to that Court. This order has not been officially reported and is reproduced as Appendix C hereto.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on May 28, 1991. (See Appendix A.) Petitioner filed a timely application to transfer to the Supreme Court of Missouri, which was denied on September 10, 1991. (See Appendix C.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves an interpretation of the Fourth Amendment to the Constitution of the United States, which provides:

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner Michael Lachterman was originally charged in the Circuit Court of the City of St. Louis, Missouri, by an indictment filed on December 1, 1987, with two identical counts charging him with the Class B felony of sodomy in violation of § 566.060 of the Revised Statutes of Missouri. Each count alleged that the offense occurred on April 17, 1987, and the victim was identified as Shaun Mack, who was under 14 years old.

On January 7, 1988, a substitute information in lieu of indictment was filed. Again, the two counts charging the same Class B felony were identical as to date and victim, and they were similar to the original indictment; in addition, the substitute information alleged that petitioner was a prior offender punishable under § 558.016, RSMo., and was a persistent sexual offender under § 558.018, based upon petitioner's conviction in St. Louis County, Missouri on January 31, 1986.

Prior to and during the time that these charges were pending in the City of St. Louis, there were also similar charges pending in St. Louis County, where petitioner was accused of sodomy with Shaun Mack on April 18, 1987, and with Shaun's cousin, Gary Mack, on April 18. In addition, petitioner was charged with sodomy in March, 1987 with Lonnie Wilcox. All of these St. Louis County offenses were alleged to have occurred at petitioner's home in Olivette, (St. Louis County), Missouri.

After the charges in St. Louis County had been disposed of pursuant to a plea bargain agreement in which petitioner was sentenced to 15 years in prison, the charges in the City of St. Louis were tried in this case. The trial lasted for three days during which the State offered evidence consisting of testimony of

police officers, the three young boys, the mother of one, and various exhibits taken from petitioner's house, including a video tape recording as to Wilcox. Petitioner's evidence consisted of court records pertaining to the proceedings in St. Louis County and the testimony of petitioner. At the conclusion of the trial, the jury returned verdicts finding petitioner guilty of both counts.

Evidence on the part of the State tended to show the following:

Petitioner had been acquainted with and had engaged in acts of sodomy with eleven-year old Lonnie Wilcox at petitioner's home. Through Wilcox he was introduced on April 17, 1987, to nine-year old Shaun Mack and ten-year old Gary Mack, who were cousins. On that date, he drove with Lonnie Wilcox, Shaun Mack, Gary Mack and two other boys in the City of St. Louis. Wilcox and the two other boys were let out of the car at a movie theatre. According to the testimony of Shaun Mack and Gary Mack, petitioner drove with them to a school yard in St. Louis. Shaun Mack testified that petitioner touched a part of the body of Shaun Mack, apparently referring to his penis, with his hands and mouth. He also testified that at petitioner's request, he touched petitioner "down below" with his hands. Although Gary Mack was in the vicinity, he did not testify to any acts of contact between petitioner and Shaun Mack. Petitioner gave Shaun Mack $40.00, and Shaun Mack gave Gary Mack $20.00.

Shaun Mack and Gary Mack testified that, after the school yard events, petitioner dropped them off at a Kroger parking lot in St. Louis, and they went home. At that time, Gary Mack's mother discovered the money on him, but he did not tell her the truth as to where the money had come from.

The next day, petitioner met Shaun Mack and Gary Mack again, drove to the St. Louis zoo, and eventually ended up at petitioner's home in St. Louis County. While there, petitioner engaged in acts of sodomy with each of them, after which petitioner drove the boys back to the Kroger parking lot. Gary

Mack's mother testified that she saw the boys emerging from petitioner's car. She was able to obtain his license number, as a result of which the vehicle was traced to petitioner and he was arrested.

A search warrant was thereafter obtained and executed, the validity of the search warrant being the question presented by this petition. Magazines and other items, including a video tape recording of acts of sodomy between petitioner and Wilcox, were seized. (In addition to the argument as to the validity of the search warrant, petitioner objected to the use of the video tape because it did not relate to the victim in this case but was evidence of another crime, and because of the nature and inflammatory effect of the contents.)

Petitioner testified that he had met Shaun Mack and Gary Mack on April 17, but denied taking them to the school yard or engaging in any acts of sodomy with Shaun Mack at that time. He acknowledged that he again met them on April 18, and that he took them to his house after they talked of prior sex activities with others. He admitted acts of sodomy with them on April 18 in his house. He also admitted such acts with Lonnie Wilcox on prior occasions in his house and that he had made the video tape. He testified that he pleaded guilty to those charges which had taken place at his house in St. Louis County.

Petitioner had been under the care of a psychologist since his conviction in January, 1986; he was examined with reference to the 1987 charges for a determination of his ability to stand trial. The Court refused to allow evidence by the medical witnesses; offers of proof were made that in all of the discussions that petitioner had with the various medical personnel, he admitted those events to which he had pleaded guilty in St. Louis County but had denied any illegal conduct at the school yard in St. Louis on April 17, 1987.

After instructions and closing arguments, the case was submitted to the jury. The jury returned verdicts finding petitioner guilty of both counts. Pursuant to statutes relating to sentencing of prior offenders and persistent sexual offenders, the Court imposed sentences of 30 years without probation or parole as to each of Counts I and II, said sentences to run consecutively to each other for a total of 60 years and concurrently with the St. Louis County fifteen year sentence.

In due time, petitioner appealed to the Missouri Court of Appeals, Eastern District, which affirmed his conviction (App. A and B); the Supreme Court of Missouri thereafter denied discretionary review (App. C). Petitioner is presently confined at the Missouri State Penitentiary in the service of his sentences in the St. Louis County case and the instant case.

Raising of Federal Questions

The search and seizure question presented for review by this petition was raised at trial when the State, over petitioner's objection, offered evidence seized by officers pursuant to a search warrant. (For this Court's convenience, copies of the application, affidavit and search warrant are attached hereto as Appendix D.) Petitioner filed a written motion to suppress the evidence, raising various constitutional objections. (A copy of said motion is attached hereto as Appendix E.) The raising of the constitutional issue in the appellate proceedings in Missouri was recognized in the opinion of the Court of Appeals (812 S.W.2d at 763; see Appendix, page A-3):

"Defendant's second point asserts the trial court erred by admitting into evidence exhibits seized as a result of a search warrant unconstitutionally broad in its scope and issued without probable cause. U.S. Const. amend IV; Mo. Const. art. 1, § 15."

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

The events charged in the indictment were alleged to have occurred in the City of St. Louis on April 17, 1987. Petitioner was arrested the next day, and on April 19, a search warrant was issued directed to his residence and automobile in St. Louis County to seize "pornographic material, controlled substances, and instrumentalities of the crime of sodomy." The search warrant (see Appendix D, page A-28) was issued by the Hon. John F. Kintz, Associate Circuit Judge of St. Louis County, Missouri, and was based upon an application by officer McLain of the Olivette police department; the application (see Appendix D, page A-26) was basically a form in which had been inserted a request to search for the quoted material.

An affidavit (see Appendix D, page A-27) attached to the application was signed by Patrolman McLain, and he stated:

> "that he has reason to believe pornographic material, controlled substances, and instrumentalities of the crime of sodomy, is being kept and secreted in the place described as: #59 Pricewoods, Olivette Mo., including a 1979 Chevrolet, License RHL 137 MO. that is located in an attached garage."

The basis for his belief was set forth as follows:

> "Sodomy victim, Shawn Mack, and sodomy victim, Gary Mack have stated to this office that at the above residence and in the aforementioned vehicle, Michael Lachterman had marijuana, pornographic material, and a large amount of money that was used to pay minors to attract them for sexual activity."

There was nothing set forth in the application or affidavit to indicate the dates of the alleged offenses, the dates of the statements by the victims, or the dates when or manner in which

the victims learned of the presence of the items in the residence or vehicle.

From a reading of the application, affidavit and search warrant, it is clear that the documents are deficient in a number of areas. In the first place, the warrant is a general warrant without specificity or guidelines to the searching officers as to the materials to be sought. To sustain such a warrant violates the doctrine condemning general warrants established by this Court in cases such as *Boyd v. United States*, 116 U.S. 616 (1886), *Marron v. United States*, 275 U.S. 192, 195-196 (1927); *Stanford v. Texas*, 379 U.S. 476 (1965), and *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The warrant here gave no guidelines but left entirely to the discretion of the officers the determination of what is "pornographic material, controlled substances, and instrumentalities of the crime of sodomy". As said in *Marcus v. Search Warrant of Property*, 367 U.S. 717, 732 (1961):

> "They [the officers] were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity."

Secondly, even if any portion of the warrant was valid, it could not be used for a general exploratory search. As said in *Marron v. United States, supra*, at 196:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another."

Thirdly, the search warrant was deficient because it was based upon an application and affidavit which lacked any information as to the reliability of the sources of information. There was nothing in the affidavit to show that the alleged victims, whose ages were not shown, were reliable, or even that the victims had

been in the residence or automobile; there was no statement as to the sources of their information.

Finally, the documents did not disclose any dates when the alleged sodomy victims obtained their information and conveyed it to the officer who made the affidavit. Staleness and, a fortiori, complete absence of time obviate probable cause. In *Sgro v. United States*, 287 U.S. 206 (1932), this Court rejected a search warrant because of staleness, and said (at 210-211):

> ". . . The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual. . . . While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. . . .
>
> ". . . The . . . warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture."

As said by Justice McReynolds, concurring (at 215-216);

> "The statutes require that a warrant to search for intoxicating liquors shall rest upon duly established probable cause to believe that at the time it issues the liquor is unlawfully possessed. The supporting affidavit must relate to facts which tend to show an unlawful situation actually or probably existing at the moment."

See also *United States v. Steeves*, 525 F.2d 33, 37-38 (8th Cir. 1975), and *United States v. Button*, 653 F.2d 319, 324-325 (8th Cir. 1981).

The opinion of the Missouri Court of Appeals recognizes that a search warrant authorizing a seizure of "instrumentalities of the crime of sodomy" and "pornographic material" is improper. The opinion then relies upon the warrant's authorization for "controlled substances" to validate the entire warrant. But "controlled substances" is just as deficient as the invalid categories, because it is just as general, if not more so, than those categories which the opinion condemns. The opinion is clearly in conflict with the opinions of this Court in *Boyd, Marron, Stanford,* and *Coolidge, supra.*

Once having sustained a search for "controlled substances", the opinion then erroneously, without explication or relevant citation, and contrary to *Marron, supra,* authorizes "the seizure of other items which constitute evidence of criminal activities". Aside from the fact that this is a clear example of the improper use of a general search warrant, the items seized were not evidence of criminal activities. There was no criminal activity specifically indicated as to the items seized, which were identified in the Admission of Evidence section in the opinion below (see Appendix, page A-8) as "kiddie pornographic magazine, sex books, video tapes,* photographs of children, women's undergarments, child-sized G.I. Joe tennis shoes, clippings of

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*The content of the three video tapes was not apparent to the officers at the time of seizure. One of the tapes was admitted in evidence over petitioner's objection on constitutional and other grounds. The tape showed conduct of petitioner, not with the named victim, but with another boy. It proved nothing, for petitioner had admitted and pleaded guilty to that misconduct. Its sole purpose, confirmed by the prosecutor's timing in submitting it to the jury at the close of the case, was to repulse the jury by showing a propensity to commit vile sexual crimes, rather than focusing on acts involved in this case—thus, a crime of condition rather than conduct.

(Footnote continued on page 11)

newspaper articles involving sexual incidents, hand-rolled cigarettes, a toy motorcycle and cash." Even if the authorization to seize "controlled substances" put the officers legitimately on the premises, it could not justify the seizure of what they did seize. This was not evidence of a crime. Obviously, the officers engaged in a fishing expedition under the aegis of a general warrant, all in violation of the Fourth Amendment.

The Missouri Court of Appeals is further in error on the search question because it ignored and failed to address the staleness or non-disclosure of time argument which was raised by petitioner in his brief in that Court. Thus the opinion, without comment, has failed to adhere to guidelines established by *Sgro v. United States*, 287 U.S. 206 (1932).

For all of these reasons, we believe that the Missouri Courts erred. The search warrant was invalid. It was not based upon probable cause reflecting current recent information. The application and affidavit failed to show the reliability or identity of the sources of information. The warrant itself was too general as to what could be seized and gave no guidelines to the searchers. Accordingly, petitioner's Motion to Suppress Evidence should have been sustained because of the violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

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*(Footnote * continued)*

The Court of Appeals opinion admitted the tape—*ex post facto*, according to its newly enunciated deviant sexual instincts exception to the rule of exclusion of evidence of other crimes—but recognized that the tape was "repugnant and prejudicial". There was no legitimate purpose for its admission. It was extremely obscene, offensive, vulgar, horrid and repulsive. Everything on the tape was conceded. It had no probative value; nothing except prejudice was gained from the tape. Even if the tape was properly seized, it was error for the jury to see it.

The decision of the Missouri Court of Appeals is in conflict with applicable decisions of this Court. We believe this issue presents an important federal question in the interpretation of the Fourth Amendment, and that certiorari should be granted as to this Question.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

No. 55615

STATE OF MISSOURI,
Respondent,

vs.

MICHAEL LACHTERMAN,
Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Thomas C. Mummert, III

OPINION FILED: May 28, 1991

Defendant appeals his conviction on two counts of sodomy of a minor boy in violation of § 566.060[1] and sentence as a prior and persistent offender under § 558.016 and 558.018 to two consecutive thirty-year sentences.

On April 17, 1987, Lonnie, then eleven years old, introduced defendant to Shaun, then nine years old, and his cousin Gary, then ten years old. Shaun, Gary, and Lonnie got into defendant's car together at a Kroger's lot. They were joined by Junior and Jerry. Junior, Jerry, and Lonnie were let off at a movie theater. Defendant drove Shaun and Gary around and then parked in a school parking area. After getting out of the car, Gary climbed on a roof and defendant and Shaun descended a ramp into a basement area where defendant sodomized Shaun. Defendant

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[1] All statutory references are to RSMo. (1986) unless otherwise specified.

returned Shaun and Gary to the Kroger's lot, gave Shaun two twenty dollar bills, and let the boys out.

On April 18, 1987, defendant again picked up Shaun and Gary at the Kroger's lot. Lonnie, Junior, and Jerry joined them in the car but were dropped off at Sears. Defendant drove Shaun and Gary to the zoo, to a shopping area, and then to his house where he sodomized both Gary and Shaun. Another man arrived at defendant's home during this period. When defendant returned the boys to the Kroger's lot he gave forty dollars to each boy but yanked the bills away after he saw Gary's mother.

An indictment issued December 1, 1987 charged defendant with two counts of sodomy in violation of § 566.060, punishable under § 558.011.1(2), in that defendant had deviate sexual intercourse in St. Louis City with Shaun on April 17, 1987. The second count contained identical language. On January 7, 1988, a substitute information in lieu of indictment was filed which added provisions that defendant was a prior and persistent sexual offender under § 558.016 and § 558.018.

A jury found defendant guilty of both counts on August 10, 1988. Defendant was sentenced on each count to consecutive terms of thirty years without probation or parole to run concurrently with sentences imposed in St. Louis County. Defendant filed a timely appeal.

CONTINUANCE

In his first point, defendant contends the trial court erred when it refused to grant his August 8, 1988 motion for a continuance to locate a defense witness, the man who had been at the house on April 18. Defendant asserted this witness would corroborate his testimony that the boys had been sodomized for money on April 17 by someone else.

Rule 24.10 regulates a motion for continuance due to an absent witness. A trial court's ruling on a motion for continuance will not be reversed on appeal unless the proponent makes a strong showing that the court clearly abused its discretion. State v. Nave, 694 S.W.2d 729, 735 (Mo. banc 1985), *cert.* denied, 475 U.S. 1098, 106 S. Ct. 1500, 89 L.Ed.2d 901 (1986); State v. Brown, 762 S.W.2d 471, 475 (Mo. App. 1988). In ruling on the motion, the trial court may consider the probability that the witness will not be found. State v. Wade, 711 S.W.2d 523, 531 (Mo. App. 1986). The trial court does not abuse its discretion if a continuance probably would not result in the presence of the witness at trial. State v. Leigh, 621 S.W.2d 515, 517 (Mo. App. 1981).

Trial was originally set for February 16, 1988. By the time the trial court denied a continuance on August 8, 1988, it had already granted three defense motions for continuance: February 15, 1988, April 14, 1988, and July 5, 1988. In view of the efforts that had been undertaken to find the witness, including a search by a private investigator, the trial court could reasonably conclude the missing witness would not be found. The trial court did not abuse its discretion when it denied a fourth continuance.

SEARCH WARRANT

Defendant's second point asserts the trial court erred by admitting into evidence exhibits seized as a result of a search warrant unconstitutionally broad in its scope and issued without probable cause. U.S. Const. amend. IV; Mo. Const. art. 1, § 15.

"A warrant may be issued to search for and seize . . . any of the following: [p]roperty, article, material, or substance that constitutes evidence of the commission of a criminal offense." § 542.271.1(1) Section 542.276 sets out the procedure, form, and contents required for a valid application, affidavit, and search warrant.

A judge must first determine that probable cause exists, State v. Johnson, 677 S.W.2d 330, 332 (Mo. App. 1984), from the totality of the circumstances. State v. Gardner, 741 S.W.2d 1 (Mo. banc), *cert.* denied, 486 U.S. 1025, 108 S. Ct. 2001, 100 L.Ed.2d 232 (1987) (citing the test enunciated by the Supreme Court in Illinois v. Gates, 462 U.S. 213, 238-239, 103 S. Ct. 2317, 2332, 76 L.Ed.2d 527, 545 (1983)):

> The task of the issuing magistrate is simply to make a practical, common sense decision whether given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gardner, 741 S.W.2d at 7; State v. Holland, 781 S.W.2d 808, 812 (Mo. App. 1989).

Given all the circumstances in this case, we have no hesitancy in finding a substantial basis for the conclusion of the associate circuit judge that probable cause existed for the issuance of the search warrant. "A substantial basis for believing hearsay is established if the affidavit shows that the informant gleaned the information through personal observation and if the informant's statement are corroborated through other sources." State v. Ambrosio, 632 S.W.2d 262, 265 (Mo. App. 1982). Here, the affidavit supporting the application was based upon the personal observations of not one but two of defendant's victims. That they were victims rather than mere uninvolved informants further reduces the concern over reliance upon a reckless or prevaricating tale. Plant v. State, 781 S.W.2d 245, 246-47 (Mo. App. 1989).

We detect considerably more substance in defendant's argument that the warrant, authorizing a search for and the seizure of "pornographic material, controlled substances, and instrumentalities of the crime of sodomy" lacks sufficient detail and particularity.

A search warrant must "[i]dentify the property, article, material, substance . . . to be searched for and seized, in sufficient detail and particularity that the officer executing the warrant can readily ascertain it[,]" § 542.276.6(4), or be deemed invalid. § 542.276.10(5). A "search warrant must leave nothing to the discretion of the officers who execute it, but rather must contain a clear command." State v. Munson, 714 S.W.2d 515, 523 (Mo. banc 1986), citing Stanford v. Texas, 399 U.S. 476, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965). A court reviewing the validity of a search warrant must consider "whether the items were sufficiently described so that an exercise of judgment respecting the items to be seized is not arbitrary . . . and left to the caprice of the police conducting the search." State v. Flauaus, 515 S.W.2d 873, 877 (Mo. App. 1974).

The phrase "instrumentalities of the crime of sodomy", rather than constituting a sufficiently particularized description of property subject to seizure, opens the door to the exercise of unfettered discretion on the part of the officers executing the warrant. Although we readily concede our lack of expertise in the subject, we read the State's suggestion that the phrase encompasses devices which might be used by a sodomist for sexual gratification as constituting an overly broad generalization limited only by stretches of individual imagination. The seizure in this case of such objects as women's undergarments and children's size tennis shoes demonstrates the breadth of the officers' interpretation of the warrant's language.

We find a similar deficiency in the term "pornographic material." As was noted in State v. Watson, 715 S.W.2d 277 (Mo.

App. 1986), the use of a generic term to describe the subject matter of a search warrant does not cause the warrant to be invalid per se. *Id.* at 280. However, the validity of such a warrant generally depends upon the existence of "objective, articulated standards" by which the officers can distinguish between those items subject to seizure and those that are not, *id.*, quoting from U.S. v. Pollock, 726 F.2d 1456, 1466 (9th Cir. 1984), and circumstances do not permit the officers to provide a more detailed and specific description. State v. Johnson, 677 S.W.2d 330, 331 (Mo. App. 1984). Neither of these conditions is present here.

In view of the debate which has persisted in our judicial system for decades and in our society for centuries over what is and what is not pornographic, that adjective can hardly be said to establish an objective, articulated standard. What one searching officer may view as pornographic another may consider a work of art. This element of subjectivity caused the quashing of a search warrant directing the seizure of "obscene, lewd, licentious, indecent or lacivious" articles in In Re Search Warrant of Property, etc., 369 S.W.2d 155, 158 (Mo. 1963) because of the absence of any directions in the exercise of discretion as to what constituted an obscene article. *See also,* Marcus v. Search Warrants of Property, etc., 367 U.S. 717, 732, 81 S. Ct. 1708, 1716, 6 L.Ed.2d 1227 (1961).

The State argues that it would have been impossible for the officers to learn from the children the titles of the magazines in order to be more specific in the application for the warrant. However, it was obviously within the knowledge and ability of the officers to apply for a warrant to search for and seize "photographs, magazines and videotapes depicting children engaged in sexual conduct." The generalization "pornographic materials," fails to describe the property "in sufficient detail and particularity" as required by § 542.276.1(3).

We do not view the term "controlled substances" with similar disfavor. A controlled substance is, by definition, a substance listed upon the schedules contained within Chapter 195 RSMo. (1986). No discretion is left to the searching officer except to search for and seize substances so listed. As stated in *Munson*, the requirement of specificity "does not fail simply because a person with specialized knowledge may have to identify the listed articles." State v. Munson, *supra*, 714 S.W.2d at 523.

Although defendant places great reliance upon the language of the *Munson* opinion in arguing that the term "controlled substances" lacks the required particularization for a valid search warrant, we find *Munson* readily distinguishable. The challenged search warrant in *Munson* authorized the search for and seizure of "drug paraphernalia within the meaning of RSMo. 195.010(11)." A copy of that statute was attached to and incorporated by reference in the warrant. The Supreme Court stated that except for the attachment of the statute the warrant would have been invalid. *Id.* The attached statute defined drug paraphernalia to include such commonplace items as "blender, banks, containers, spoons and mixing devices . . . capsules, balloons, envelopes . . ." if intended or designed for compounding, packaging or concealing controlled substances. The statute further authorized consideration of direct and circumstantial evidence of intent of the one in control of such commonplace objects in order to determine if they were drug paraphernalia. The court acknowledged the propriety of the defendant's argument that determination of intent introduced an impermissible element of discretion but discounted this factor because the statute "specifically lists the very items on which the charges focus." *Id.* The same is true here. "Controlled substances" is a term limited by statutory definition, and no resort to the intent of the possessor is necessary in order to determine that such a substance is subject to seizure. It is either listed in the statute or it is not. We follow the court's admonition in *Munson* by

acknowledging that the form of the warrant is not to be commended and that it would have been preferable for the warrant to have utilized the specific substance, marijuana, identified in the affidavit. However, as this court ruled in State v. Holland, *supra*, 781 S.W.2d at 814, particularity in a generalized search warrant may, in some cases, be supplied by reference to the application and the supporting affidavits upon which the warrant was issued. Accordingly, we find the search warrant validly authorized the entry into defendant's premises to search for and seize controlled substances. It follows that the seizure of other items which constitute evidence of criminal activities and which are found during the legitimate search for controlled substances are also subject to seizure. *Id.*

ADMISSION OF EVIDENCE

Property seized by the officers during the search included "kiddie pornographic magazine", sex books, video tapes, photographs of children, women's undergarments, child-sized G.I. Joe tennis shoes, clippings of newspaper articles involving sexual incidents, hand-rolled cigarettes, a toy motorcycle, and cash. Over defendant's repeated and continuing objection, all of these articles except the women's undergarments and the hand-rolled cigarettes were admitted into evidence and shown to the jury. Defendant objects on the grounds that the articles are irrelevant to the issue of his guilty or innocence of the acts allegedly committed on April 17, 1987, in the City of St. Louis. In addition, he claims the videotape shown to the jury as well as oral testimony relating to his sodomizing of other boys on different dates in St. Louis County were erroneously admitted over his objection, because they constituted evidence of other crimes. In overruling defendant's objections the trial court accepted the argument of the assistant circuit attorney that the evidence was admissible under the common scheme or plan exception to the rule excluding evidence of uncharged crimes and to show motive.

Evidence is relevant if it tends to prove or disprove a fact in issue or if it corroborates evidence that is irrelevant and bears on a principal issue. State v. Jackson, 738 S.W.2d 510, 512 (Mo. App. 1987). The issue in this case is whether or not defendant committed the acts of sodomy upon Shaun on April 17, 1987, in the City of St. Louis. Does defendant's possession of magazines, photographs, and newspaper articles pertaining to sexual acts with children, tend to prove or disprove this issue? Is the evidence that defendant committed sodomy with Shaun and other children at different times and places relevant to this issue and is such evidence admissible despite the rule excluding evidence of uncharged crimes? We answer all of these questions in the affirmative.

In explanation of our answer, a brief review of the increasingly liberal attitude toward the admission of evidence regarding the sexual conduct of defendants charged with sexual abuse of children is in order. In State v. Atkinson, 285 S.W.2d 563 (Mo. 1955), a conviction of child molestation was reversed because of the admission of testimony by a boy other than a victim of the charged crime that defendant had done the same thing to him. This same defendant was later convicted of sodomy upon another 15-year old boy. This conviction was also reversed because of the testimony of two other boys about the defendant's sodomous relations with them. State v. Atkinson, 293 S.W.2d 941 (Mo. 1956). The court, although recognizing the appearance of some merit to the argument, expressly rejected the State's theory that "[s]o strange and unusual are the acts of homosexuality, so far outside the ordinary pattern of male conduct, that a man who has proven to have committed the act with one or more persons would certainly be deemed to be much more likely to have committed the act with yet another person". *Id.* at 943. Relying upon the *Atkinson* cases, defendant here argues that the Missouri Supreme Court has come down squarely against the admission of evidence showing a defendant's propensity or

proclivity to engage in a particular type of illicit behavior including such aberrant conduct as sexual abuse of children. Accordingly, defendant argues, the admission into evidence of the magazines, photographs and newspaper articles, none of which were displayed to the victim, and which could have no relevance other than to show an interest on the part of defendant in sexual conduct with children was error. Additionally, the videotape and the testimony regarding his conduct with other boys was erroneously admitted because this evidence does not fit into any of the recognized exceptions to the rule against the admission of evidence of uncharged crimes.

In State v. Taylor, 735 S.W.2d 412 (Mo. App. 1987) the Honorable Almon H. Maus authored an opinion which thoroughly explores decisions from other states and Missouri, and which refers to authoritative texts and articles regarding what Judge Maus appropriately refers to as "the depraved sexual instincts doctrine". *Id.* at 417. In describing this concept Judge Maus adopts the following quotation from State v. McDaniel, 80 Ariz. 381, 298 P.2d 298, 802-03 (1956);

> Certain crimes today are recognized as stemming from a specific emotional propensity for sexual aberration. The fact that in the near past one has given way to unnatural proclivities has a direct bearing upon the ultimate issue whether in the case being tried he is guilty of a particular unnatural act of passion. The importance of establishing this fact far outweighs the prejudicial possibility that the jury might convict for general rather than specific criminality. Even granting the general rule of inadmissibility of evidence of independent crimes to prove the offense charged, many courts recognize a limited exception in the area of sex crimes to prove the nature of the accused's specific emotional propensity.

Taylor, 735 S.W.2d at 415.

A review of decisions in Missouri courts in cases involving sexual abuse of children reveals that Missouri has adopted this concept in fact, if not by name, in such cases. Although often enunciating the rule against the admission of evidence of other crimes for purposes of showing propensity, these decisions find such evidence admissible by characterizing it as fitting within one or another of the exceptions to the general rule. *See* e.g. State v. Kerr, 767 S.W.2d 344, 345 (Mo. App. 1989). Analysis of the decisions, however, discloses that the purpose for which the exception was created is clearly not the purpose purportedly justifying the admission of the evidence.

We have long recognized that evidence of a defendant's commission of an uncharged crime has logical relevance for the purpose of proving identity, motive, intent, absence of mistake or accident or as a part of a common scheme or plan. State v. Reese, 364 Mo. 1221, 274 S.W.2d 304 (Mo. banc 1954). One of these exceptions frequently resorted to in child sex abuse cases is that evidence of other sexual conduct with the same victim is relevant to show the defendant's motive, satisfaction of sexual desire for that child. State v. Christeson, 780 S.W.2d 119, 123 (Mo. App. 1989); State v. Osterloh, 773 S.W.2d 213, 216 (Mo. App. 1989); State v. Gunter, 715 S.W.2d 576, 578 (Mo. App. 1986).

Another frequently used exception in such cases is that other acts of sexual abuse of other children is admissible as a part of a common scheme or plan. State v. Fraction, 782 S.W.2d 764, 768 (Mo. App. 1989); State v. Christeson, *supra*; State v. Osterloh, *supra*; State v. Kerr, *supra*; State v. V____ C____, 734 S.W.2d 837, 843 (Mo. App. 1987). These and other cases using the common scheme or plan exception as a means of demonstrating the relevance of uncharged acts of sexual abuse of children equate similarity of conduct with common scheme. This, we submit, is a distortion of the common scheme or plan exception. Traditionally, this exception was established in order to justify

the admission of evidence that the defendant committed an uncharged crime as a part of a chain or series of events in which the charged offense was one of a sequence of acts each committed for the purpose of facilitating the others. *See,* State v. Courter, 793 S.W.2d 386, 388 (Mo. App. 1990). For example: the escape from jail and the theft of an automobile would be admissible in the homicide case arising from the death of a pedestrian struck by the automobile during the escape.

Similarity of conduct, the so-called *modus operandi* exception is based upon its relevance toward proving the issue of identification. The fact that the same crime was committed in the same fashion with the same specific details leads logically to the conclusion that the two crimes were committed by the same person. This exception is usually limited to conduct of such an unusual or distinctive nature as to point almost unerringly to a single individual. Thus, similarity of conduct involved in the commission of separate crimes is not properly characterized as falling within the common scheme or plan exception to the general rule.

One other exception to the rule against admitting evidence of uncharged crime needs mention. Although not listed in State v. Reese, *supra*, we have come to recognize the relevance of evidence of a defendant's commission of a crime unrelated to the charged offense when necessary to provide a complete and coherent picture of the totality of the circumstances which tend to establish defendant's guilt. In State v. Wilson, 755 S.W.2d 707 (Mo. App. 1988) this court ruled that evidence of the defendant's commission of a burglary in Santa Monica, California, was properly admitted during his trial for a murder committed in Maplewood, Missouri. While in custody in California on the burglary charge, the police learned the defendant was a suspect in the Missouri murder. The California police interrogated him and obtained a detailed confession of the homicide. In addition, the tread of defendant's tennis shoe matched a foot

print in the mud at the scene of the burglary and also a bloody footprint at the scene of the murder. Thus, the investigation of one crime was so inseparably connected with the investigation of another crime that proof of one necessarily involved proof of the other. *Id.* at 710. *See also,* State v. Mantia, 748 S.W.2d 785 (Mo. App. 1988); State v. Churchir, 658 S.W.2d 35 (Mo. App. 1983).

Although this "complete picture" exception to the general rule seldom has application in child sexual abuse cases, it does demonstrate that the five exceptions listed in *Reese*, and constantly repeated in later decisions, are not exclusive of other exceptions. The crucial question is one of relevance—does proof that the defendant committed another crime logically tend to prove he committed the charged offense? Although it cannot be denied that the admission of such evidence may be prejudicial because it may result in a conviction founded upon crimes other than the charged offense, "relevance, not prejudice, is the touchstone of due process and . . . the question of whether the prejudicial effect outweighs its probative value rests within the sound discretion of the trial court." State v. Trimble, 638 S.W.2d 726, 732 (Mo. banc 1982).

In cases involving sex crimes generally, and even more so in cases of child sexual abuse, courts have been markedly liberal in holding evidence of prior and subsequent sexual conduct of the defendant admissible. *See* State v. Taylor, *supra*, 735 S.W.2d at 416-17. However, this liberality is often accomplished through such a strained and distorted application of the recognized *Reese* exceptions that we run the danger of forcing a square peg into a round hole. For example, in this case the defendant's possession in his home of magazines and photographs depicting children engaged in sexual conduct does not fit into any of the five recognized exceptions and has no relevance other than showing the defendant possessed an interest in such activities. The prejudicial effect of the evidence of defendant's sexual abuse of other boys far outweighs the probative value of such evidence

toward proving identity, motive, or intent as none of these was a disputed issue in the case. To say the similarity of defendant's conduct with the victim and with the others shows a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other is tantamount to saying that the defendant's scheme or plan was to fulfill his propensity, proclivity or disposition toward such deviant behavior.

It has been said that permitting evidence of similar sexual conduct with others than the victim under the common scheme or plan exception is "spurious" and a subterfuge for admitting the defendant's similar misdeeds. Imwinkelreid, *Uncharged Misconduct Evidence*, § 4:13 (1990). Professor Imwinkelreid continues:

> The courts were routinely straining and distorting the plan doctrine to rationalize the admission of evidence of the defendant's uncharged sexual misconduct. In some jurisdictions, intellectual honesty triumphed and the courts eventually acknowledged that they were recognizing a special exception to the norm prohibiting the use of the defendant's disposition as circumstantial proof of misconduct.

Id. at § 4:14.

Although we do not espouse the caustic terminology used by Professor Imwinkelreid, our review of the Missouri decisions compels us to acknowledge that Missouri has in fact recognized a special exception for the admission of evidence of prior and subsequent similar conduct in cases of sexual abuse of the victim of the crime on trial, calling it relevant toward establishment of the defendant's motive. State v. Bailey, 190 Mo. 257, 88 S.W. 733 (1905); State v. Osterloh, *supra*, 773 S.W.2d at 216. The motive is obviously to satisfy a deviate sexual instinct, proclivity, propensity or disposition with this victim. Under the guise

of the common scheme or plan exception, we admit evidence of defendant's sexual misconduct with the victim's siblings, State v. Christeson, *supra*, 780 S.W.2d at 122, and with other children in his custody and control. State v. Muthofer, 731 S.W.2d 504 (Mo. App. 1987); State v. Koster, 684 S.W.2d 488 (Mo. App. 1984). The "plan" is to fulfill the deviate sexual instinct, proclivity, propensity, or disposition to engage in sexual conduct with children. Thus, through a distorted application of the established exceptions to the general rule, we are today accepting the identical argument expressly rejected by the Supreme Court in the Atkinson cases forty-five years ago.

We view such conduct as so unnatural and depraved that regardless of the relationship or similarity of status between the victim and other children subjected to like sexual abuse by the defendant, evidence that the defendant engaged in similar acts of sexual abuse of children of the same sex as the victim near in time to the acts charged tends to prove the defendant's guilt of the crime on trial. Evidence of repeated acts of sexual abuse of children demonstrates, per se, a propensity for sexual abberation and a depraved sexual instinct and should be recognized as an additional, distinct exception to the rule against the admission of evidence of uncharged crimes.

We are not unmindful of the prejudicial impact upon a jury of evidence that a defendant has committed other crimes. For that reason we emphasize that what we say here should be narrowly construed. It is not our intention to open the door for the admission of evidence of any type of sexually aberrant behavior on the part of defendant. We are aware that our colleagues in the Western District in State v. D.A.R., 752 S.W.2d 910 (Mo. App. 1988), where the defendant was charged with committing two acts or oral sodomy upon his nine year old daughter, approved the admission of testimony by the defendant's former paramour that she consensually engaged in oral sex with the defendant. The court held such testimony admissible as "tend[ing] to

corroborate the child's testimony that the defendant made her perform oral sex on him by indicating a disposition on the part of defendant for that type of sexual activity." *Id.* at 913. We recognize the prejudicial effect of evidence of consensual conduct with an adult is slight, but we also find highly questionable the relevance and probative value of sexual conduct with an adult in a case involving sexual abuse of a child. We also point out that remoteness in time of even similar sexual misconduct with children may destroy the probative value of such evidence. *See,* State v. Courter, *supra*, 793 S.W.2d at 390.

Consequently, we limit our finding of relevance and probative value to other acts of sexual abuse of children of the same sex as the victim occurring near in time to the acts charged. It is the recurrent and continuing penchant for engaging in sex with children that demonstrates such deviance and depravity as to give significance to the uncharged conduct. The trial court did not err in admitting evidence of defendant's sexual abuse of boys other than the victim or of his possession of magazines and photographs depicting children engaged in sexual conduct.

VIDEO TAPES

In a separate point on appeal, defendant asserts trial court error in permitting the State to show to the jury the video tape of his acts of sodomy with Lonnie. Defendant argues the content of the video tape was "so gruesome, inflamatory, and repugnant as to be shocking and prejudicial."

Defendant concedes the admission of photographs and video tapes is, in the first instance, a matter addressed to the sound discretion of the trial court. In exercising this discretion the court must determine whether or not the prejudicial effect of such material outweighs its probative value. If the evidence is relevant and tends to establish an essential element of the State's case, it need not be excluded merely because it is inflamatory or

because of oral testimony describing the same facts. State v. Murray, 744 S.W.2d 762, 772 (Mo. banc 1988). The very fact that the defendant made and retained a video tape of himself in the act of sodomizing a child is certainly probative of his deviant sexual instincts, a subject we have found above to have independent significance toward proving child sexual abuse. Moreover, certain similarities between the defendant's acts and statements as described by Shaun in the April 17 school yard incident, and as shown and heard in the video tape with Lonnie tend to disprove defendant's testimony that Shaun said one "Mike the Nark" had committed the April 17 offense.

We do not dispute defendant's characterization of the video tape as "repugnant and prejudicial". That fact alone, however, does not require its exclusion. State v. Black, 748 S.W.2d 184, 187 (Mo. App. 1988). In view of all the circumstances, including defendant's admissions of sexual abuse of young boys over a period of years, and that he made and retained the video tape of his sexual activities with Lonnie, we cannot say the prejudicial effect of showing the tape to the jury so outweighed its relevance as to constitute an abuse of trial court discretion or to deprive the defendant of a fair trial.

MEDICAL TESTIMONY

Defendant next charges trial court error in excluding the testimony of two psychologists, a psychiatrist and a social worker who examined defendant prior to trial. Defendant offered to prove through these witnesses that he had freely admitted his guilt of the charges in St. Louis County based upon incidents occurring in his home, but that he had consistently denied the events allegedly occurring in the City of St. Louis on April 17. He argues that because these statements were taken as a part of the defendant's history in connection with mental examinations they should be admissible as an exception to the rule against hearsay. We disagree.

Statements made in connection with a mental or physical examination are said to be admissible, even though they constitute hearsay, provided such statements constitute an essential element of the doctor's diagnosis and furnish a basis for treatment. State v. Moore, 721 S.W.2d 141, 143 (Mo. App. 1986). Defendant's admission to the doctor that he repeatedly sodomized boys may well fall within this classification. His denial of such conduct, however, can hardly be seen as forming any basis for diagnosis and treatment. The excluded evidence was nothing more than the self-serving exculpatory statements by a defendant offered for no reason other than to bolster his in-court testimony. The court did not err in excluding this evidence. State v. Cooksey, 787 S.W.2d 324, 328 (Mo. App. 1990).

SUBMISSIBLE CASE AND INSTRUCTIONS

Defendant's sixth point on appeal consists of a conglomeration of procedural matters. In a single point defendant asserts insufficiency of the evidence, variance between the pleadings and the evidence, and improper jury instructions.

The first of this medley of complaints appears to be based upon the failure of the victim, eleven years old at the time of the trial, to specifically identify body parts. Shaun said defendant touched him "down below" with his hands and mouth. "Down below" meant to him the part of his body where he went to the bathroom. He also testified that the defendant made him touch the defendant "down below" with his hand and to "jack him off." We find this testimony sufficient to support the submission to the jury of one count of oral sodomy and one count of manual sodomy. In a prosecution of sodomy of a child, the name by which body parts are identified is a "collateral matter" State v. Webb, 737 S.W.2d 197, 200 (Mo. App. 1987), of no material significance under all the evidence in the case. Despite Shaun's lack of specificity it is clear he was describing the defendant touching his penis with his mouth and requiring him to touch defendant's penis with his hand.

Next defendant argues his conviction under Count II should be reversed because of a variance between the evidence and the State's response to his motion for a bill of particulars. The indictment charged defendant with two offenses of sodomy upon Shaun. The two counts were stated in identical language. Defendant filed a motion to dismiss, a motion to elect, and a motion for a bill of particulars, none of which were presented to the court for ruling prior to the commencement of the trial. This failure constituted a waiver of the motions under Rule 24.04(b)(2). State v. Raines, 748 S.W.2d 865 (Mo. App. 1988).

On the second day of trial the judge noticed the unruled motions. The court denied the motion to dismiss and the motion to elect because the assistant circuit attorney in his opening statement had stated Count I involved defendant's placing his mouth on Shaun's penis and Count II involved the placing of Shaun's mouth on defendant's penis. The trial court observed that because of the detailed opening statement of the assistant circuit attorney the motion for bill of particulars was moot and counsel for defendant agreed. Count II was submitted to the jury under an instruction which required the jury to find that defendant had Shaun touch defendant's penis with Shaun's hand. This instruction conformed to Shaun's testimony. Defendant argues that because Shaun's testimony and the instruction failed to conform with the opening statement of the assistant circuit attorney that both counts involved acts of oral sodomy, there is a fatal variance from the response to the bill of particulars.

An argument virtually identical to this contention was rejected in State v. Doolen, 759 S.W.2d 383 (Mo. App. 1988). In *Doolen*, the State's response to defendant's motion for a bill of particulars specified that the sexual conduct charged consisted of the defendant's touching the victim's genitals. The evidence showed that the defendant had rubbed his penis against the victim. The court held the variance was not prejudicial because it did not hamper defendant's ability to prepare and present his defense nor

was it material to his defense that the incident never happened. *Id.* at 385.

Accordingly, even if we were to assume that the conversation in chambers between the trial court and counsel was sufficient to have resurrected the waived motion for a bill of particulars, no error warranting reversal of the conviction on Count II occurred. Both oral and manual deviate sexual intercourse as defined in § 566.010 when committed with the child under the age of fourteen, constitutes a crime of sodomy. § 566.060(3). Whether the sexual act involved the mouth or the hand did not affect the preparation or presentation of the defense that defendant was not with Shaun in the school yard on April 17, 1987.

Finally, defendant challenges the form of the verdict directing instruction on Count II because it failed to define "deviate sexual intercourse". He concedes that at the time of trial MAICR-3d 320.08.2 did not include such a definition. Nevertheless, he argues the definition should have been given to ensure the jury would not find the defendant guilty based upon a mere touching not involving the gratification of sexual desire.

In State v. Lowe-Bey, 807 S.W.2d 132 (Mo. App. E.D. 1991), we rejected the identical argument. We noted that the form of MAICR-3d 320.08 had been changed subsequent to the trial of that case to include a required finding that the touching constituted deviate sexual intercouse and a definition of that term. We observed "[t]his required finding and definition were added in order to ensure that no person would be convicted of sodomy by reason of a touching that was accidental or innocent, a possibility simply not present under the evidence of this case." *Id.* at 136. This observation is equally appropriate in this case. There can be no doubt concerning the sexual nature of the touching which occurred in response to defendant's request to "jack him off."

SENTENCE

Finally, defendant challenges his sentence to a total of 60 years without probation or parole. First he argues, without citation to any authority that the State should be estopped from proceeding against him in this case as a prior and persistent offender within the framework of § 558.018. This "estoppel" is predicated upon the fact that in St. Louis County the State agreed that he could be sentenced upon his guilty pleas without reference to the persistent sexual offender statute. We are unable to discern, and defendant does not suggest, how this fact invokes any of the elements of estoppel.

In Williams v. State, 800 S.W.2d 739 (Mo. banc, 1990) and State v. Burgess, 800 S.W.2d 743 (Mo. banc, 1990), our Supreme Court ruled that § 558.026 does not mandate consecutive sentences for convictions of more than one sexual offense committed at the same time, but that the trial court retains discretion to order consecutive or concurrent sentences. In this case the trial judge stated that regardless of any statutory requirement "it's the court's own intention and desire and my own discretion that is also being used here to give consecutive sentencing." Therefore, even though the trial court expressed its opinion that the statute required consecutive sentences, it is apparent that the imposition of consecutive sentences was a matter of trial court discretion. There is no need to remand this case to the trial court for the exercise of discretion in determining whether the sentences should be concurrent or consecutive in view of this record.

Additionally, defendant contends the sentence to 60 years imprisonment under the facts in this case is excessive, cruel, and unusual. His complaint should be address to the legislature, not to the court. The sentences are within the range of punishment prescribed by the statute. "[W]hen the punishment imposed is within the range prescribed by statute, it cannot be judged

excessive by the appellate court . . . [and] consecutive effect of the sentence does not constitute cruel and unusual punishment." State v. Repp, 603 S.W.2d 569, 571 (Mo. banc 1980); State v. Jackson, 676 S.W.2d 304, 305 (Mo. App. 1984).

The judgment of the trial court is affirmed.

/s/ CARL R. GAERTNER, JUDGE

Gerald M. Smith, P.J., and Harold L. Satz, J., concur.

APPENDIX B

In the Missouri Court of Appeals
Eastern District

TO: ATTORNEYS OF RECORD
FROM: DIERDRE O. AHR, CLERK
DATE: July 23, 1991
RE: MOTIONS FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

1. 54935 STATE OF MISSOURI, RESPONDENT vs. TRAMBLE, EDWARD, APPELLANT

2. 55615 STATE OF MISSOURI, RESPONDENT vs. LACHTERMAN, MICHAEL, APPELLANT

3. 56213 STATE OF MISSOURI, RESPONDENT vs. ELL, FREDDIE D., APPELLANT

4. 57645 CRESTWOOD COMMONS REDEVELOPMENT CORP., APPELLANT vs. 66-DRIVE-IN, ET AL., RESPONDENT

5. 57965 DELONG, GEORGE & REBECCA S, RESPONDENT vs. HILLTOP LINCOLN-MERCURY, INC., APPELLANT

6. 58403 JOHNSON, CLIFTON E, APPELLANT vs. ST JOHN'S MERCY MEDICAL CENTER, RESPONDENT

7. 58430 CAPOBIANCO, ROBERT L., APPELLANT vs. PULITZER PUBLISHING COMPANY, ET AL., RESPONDENT

8. 58550 STATE OF MISSOURI, RESPONDENT vs. MITCHELL, SALLY, APPELLANT

9. 58754 OVERSTREET, TOMMIE W., APPELLANT vs. STATE OF MISSOURI, RESPONDENT

10. 58783 STOLL, JACQUELINE & FRANCIS, APPELLANT vs. MISSOURI HIGHWAY & TRANSPORTATION COMMISSION, RESPONDENT

11. 58852 YORK, JAMES D., APPELLANT vs. MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT

APPENDIX C

In the Supreme Court of Missouri

No. 74057
E.D. No. 55615

September Session, 1991

State of Missouri,
Respondent,
vs. (TRANSFER)
Michael Lachterman,
Appellant.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Eastern District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1991, and on the 10th day of September, 1991, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 10th day of September, 1991.

/s/ Thomas F. Simon, Clerk

_____D.C.

APPENDIX D

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

IN , COUNTY OF ST. LOUIS

STATE OF MISSOURI

In the matter of:

SEARCH WARRANT

APPLICATION FOR SEARCH WARRANT

Ptn J. A. McLain, Olivette Police Dept., being duly sworn deposes and states upon information and belief that at the premises known, numbered and designated as:

#59 Pricewoods, including a 1979 Chevrolet automobile, license RHL137, that is located in an attached garage

is being used for the purpose of secreting

pornographic material, controlled substances, and instrumentalities of the crime of sodomy

That the basis of the affiant's information and belief is contained in the attached affidavits of witnesses to facts concerning the said matter which affidavits are made a part hereof and are submitted herewith as a basis upon which this court may find the existence of a probable cause for the issuance of said warrant.

WHEREFORE, your petitioner prays that a search warrant be issued as provided by law.

/s/ Patn J. A. McLain 163

Subscribed and sworn to before me this 19 day of April 1987

/s/ John F. Kintz

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

AFFIDAVIT

Ptn J. A. McLain, Olivette Police Dept., of lawful age, being first duly sworn, deposes and says that he has reason to believe pornographic material, controlled substances, and instrumentalities of the crime of sodomy, is being kept and secreted in the place described as:

#59 Pricewoods, Olivette Mo., including a 1979 Chevrolet, license RHL 137 MO. that is located in an attached garage

Affiant states that he has reason to believe such goods are being secreted therein because:

Sodomy victim, Shawn Mack, and sodomy victim, Gary Mack have stated to this office that at the above residence and in the aforementioned vehicle, Michael Lachterman had marijuana, pornographic material, and a large amount of money that was used to pay minors to attract them for sexual activity.

Further affiant saith not.

/s/ Patn. J. A. McLain 163

Sworn to and subscribed before this this 19 day of April 1987.

Time: 12:15 PM
Date: 4-19-87

/s/ John F. Kintz

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

IN OF ST. LOUIS COUNTY

STATE OF MISSOURI

SEARCH WARRANT

TO ANY POLICE OFFICER OF ST. LOUIS COUNTY, STATE OF MISSOURI GREETINGS:

WHEREAS, Ptn J. A. McLain, Olivette P.D. on the 19 day of April, Judge of the District Magistrate, of the County of St. Louis, State of Missouri, his duly verified application and petition in writing as provided by law stating that the place described as

#59 Pricewoods, including a 1979 Chevrolet automobile, license RHL137 that is located in an attached garage

is being used for the purpose of secreting

pornographic material, controlled substances, and instrumentalities of the crime of sodomy

in violation of the laws of the State of Missouri.

WHEREAS, from the facts set forth in said verified petition and attached affidavit, it is found by me that there is probable cause to believe that the laws of the State of Missouri are being violated at and in and upon the premises described in said petition in the manner charged.

NOW, THEREFORE, these are to command you that you search the said premises above described within 10 days after the issuance of this warrant by day or night, and take with you, if need be, the power of your county, and, if said above described property or any part thereof be found on said premises by you,

that you seize the same and take same into your possession, making a complete and accurate inventory of the property so taken by you in the presence of the person from whose possession the same is taken, if that be possible, and giving to such person a receipt for such property, together with a copy of this warrant, or, if no person be found in possession of said property, leaving said receipt and said copy upon the premises searched, and that you thereafter return the property so taken and seized by you, together with a duly verified copy of the inventory thereof and with your return to this warrant to this court to be herein dealt with in accordance with law.

WITNESS my hand and the seal of this court this 19 day of April, 1987.

/s/ John F. Kintz

APPENDIX E

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 871-1205

Division No. 19

STATE OF MISSOURI,
Plaintiff,

vs.

MICHAEL LACHTERMAN,
Defendant.

MOTION OF DEFENDANT TO SUPPRESS EVIDENCE

Now comes defendant and states:

1. Defendant has been subjected to searches of his person, automobile and premises connected with him and to the seizure of documents and other property as a result of such searches.

2. Defendant believes that some or all of such searches and seizures may have been the subject of court orders or warrants.

3. Defendant believes that such searches and seizures were not properly authorized or conducted.

4. Defendant believes that evidence and leads may have been obtained from such searches and seizures which resulted in this indictment and were used as evidence at the trial of this case.

5. Defendant desires to contest the legality of the proceedings authorizing such searches and seizures, the propriety of such searches and seizures, and the admissibility of any evidence thereby obtained and the fruits thereof.

6. The said evidence was not obtained as an incident of a lawful arrest of defendant.

7. The said evidence was obtained by means of searches and seizures without any valid warrant and without lawful authority.

8. The search warrant was improper upon its face and was illegally issued, without proper showing of probable cause.

9. The search warrant was not in the proper form.

10. The application for the search warrant was not in proper form.

11. The application for the search warrant did not state sufficient facts to establish probable cause for the issuance of the search warrant.

12. The application for the search warrant was based upon information which had been illegally obtained.

13. The property seized was not that described in the search warrant, and the officers were not otherwise lawfully privileged to seize the same.

14. The search warrant was illegally executed by the officers.

15. The search warrant was general in nature as to the property to be seized.

16. The receipt was not properly made and filed.

17. The return was not properly made and filed.

18. The searches and seizures were illegal for such other reasons as may appear at the hearing on this motion.

19. The searches and seizures were unlawful and unreasonable, contrary to the statutes of the State of Missouri and violative of the following provisions of the Constitutions of the State of Missouri and the United States:

A. The prohibition against unreasonable searches and seizures, as guaranteed by Article I, Section 15 of the Constitution of the State of Missouri and by the Fourth and Fourteenth Amendments to the Constitution of the United States.

B. The prohibition against defendant being compelled to be a witness and to testify against himself, as guaranteed by Article I, Section 19 of the Constitution of the State of Missouri and by the Fifth and Fourteenth Amendments to the Constitution of the United States.

C. The prohibition against depriving any person, including defendant, of liberty or property without due process of law, as guaranteed by Article I, Section 10 of the Constitution of the State of Missouri and by the Fifth and Fourteenth Amendments to the Constitution of the United States.

D. The prohibition against depriving any person, including defendant, of his natural right to liberty, the pursuit of happiness and the enjoyment of the gains of his own industry, of equal rights and opportunity under the law, and of the equal protection of the law, as guaranteed by Article I, Section 2 of the Constitution of the State of Missouri and by the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, defendant requests this Court to grant the following relief:

A. Conduct a hearing to determine the validity of such proceedings and the searches and seizures.

B. Suppress all of the evidence in the possession of the plaintiff, strike all of such evidence previously admitted in evidence and bar the State of Missouri from using said evidence and any of the fruits thereof in this case.

C. Grant such further and other relief as the Court may deem proper.

/s/ IRL B. BARIS MBE # 13978
Attorney for Defendant
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
231-8700

(2)

No. 91-1014

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1992

MICHAEL LACHTERMAN,

Petitioner,

vs.

STATE OF MISSOURI

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. WEBSTER
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Assistant Attorney General
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Attorney for Petitioners

INDEX

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STATEMENT OF THE CASE

Petitioner, Michael Lachterman, was convicted of two counts of sodomy of a minor boy in violation of § 566.060 RSMo 1986, and sentenced as a prior and persistent offender under § 558.016 and 558.018 to two consecutive thirty year sentences. Petitioner filed a direct appeal and a motion to vacate, set aside, or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's Rule 29.15 motion was consolidated with his direct appeal. The facts relating to petitioner's offense are summarized in the opinion of the Missouri Court of Appeals, Eastern District, affirming petitioner's conviction, sentence, and the denial of post-conviction relief. **State v. Lachterman**, 812 S.W.2d 759 (Mo.App. 1991).

ARGUMENT

I. Constitutionality of Search Warrant

Petitioner challenges the trial court's ruling admitting various items seized pursuant to a search warrant. Specifically, petitioner claims that the search warrant authorizing the seizures was invalid in two respects. First, he argues that the items described in the warrant were "too general as to what was to be seized and provided no guidelines to the searching officers". Secondly, he claims that the affidavit supporting the warrant lacked information demonstrating the reliability of its sources and specificity as to the dates on which the alleged sodomy victims obtained their information. Based on these alleged deficiencies, appellant argues that items seized pursuant to this war-

rant should have been suppressed at trial.

Specificity of Items to be Seized

Appellant first contends that the warrant authorizing the search and seizure did not state with particularity the items to be seized. The application for search warrant provided that:

> Ptn J.A. McLain, Olivette Police Department, being duly sworn deposes and states upon information and belief that at the premises known, numbered and designated as: Number 59 Pricewoods, including a 1979 Chevrolet automobile, License RHL 137, that is located in an attached garage is being used for the purpose of secreting pornographic material, controlled substances, and instrumentalities of the crime of sodomy.

Appellant specifically argues that the terms "pornographic material", "controlled substances",[1] and "instrumentalities of the crime of sodomy", failed to comply with the statutory requirements, in that such designations did not provide sufficient guidelines for the searching officers.

The Fourth Amendment prohibits "general warrants" in an effort to prevent exploratory rummaging in a person's belongings. **Coolidge v. New Hampshire**, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971). "A warrant is valid if the description is sufficiently definite to enable the executing officer to reasonably ascertain and identify the

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[1] The controlled substances discovered during the search were not admitted at trial.

place to be searched and the objects to be seized. **Steele v. United States**, 267 U.S. 498, 503-04, 45 S.Ct. 414, 416, 69 L.Ed.2d 757 (1925). However, when applying this constitutional standard, there is a "practical margin of flexibility", therefore, the warrant need only be "sufficiently definite" to measure whether given the specificity in the warrant, a violation of personal rights is likely. **United States v. Johnson**, 541 F.2d 1311, 1313 (8th Cir. 1986). The degree of specificity may necessarily vary according to the circumstances and type of items involved. **U.S. v. Porter**, 831 F.2d 760, 764 (8th Cir. 1987).

Where the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice if such standards reasonably guide the officers

in avoiding the seizure of protected property. See, **Andresen v. Maryland**, 427 U.S. 463, 479-82, 96 S.Ct. 2737, 2748-49, 49 L.Ed.2d 627 (1976) (upholding warrant authorizing the seizure of "other fruits, instrumentalities and evidence of crime at this [time] unknown"); **United States v. DeLuna**, 763 F.2d 897, 908 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985).

In this case, the terms used to describe the items to be seized were sufficient under the circumstances.[2] However, assuming, only for purposes of argument, that the terms "pornographic ma-

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[2] **Andresen v. Maryland**, 96 S.Ct. at 2748, (use of term "together with other fruits, instrumentalities and evidence of [the] crime" was not constitutionally infirm).

terial" and "instrumentalities of the crime of sodomy" were insufficient the fact remains that authorization to search for "controlled substances" was sufficiently particular to eliminate unnecessary discretion on the part of searching officers. The term "controlled substance" is a term used to designate the class of substances which are prohibited under Chapter 195, Missouri Revised Statutes (amended 1989). Specifically, the term "controlled substance" as designated in that chapter "means a drug, substance, or immediate precursor in Schedules I through V listed in this chapter". § 195.010(6), RSMo 1986. These schedules set forth the specific drugs which fall within the statute's purview, and therefore constitute "controlled substances". The term "controlled substances" therefore encom-

passes only the substances listed in the designated schedules. The meaning of "controlled substances" leaves nothing to the discretion of searching officers. Only those substances listed in the enumerated schedules are considered "controlled substances". As a result, only those specific substances fall within the scope of the warrant. Under these circumstances, an officer is completely limited in the items he may seize.

In fact, although Missouri courts have yet to determine the validity of naming "controlled substances" in a search warrant, other state's have explicitly upheld this term as a sufficiently particular description of items to be seized. State v. Quitana, 87 N.M. 414, 417, 534 P.2d 1126, 1130 (N.M. Ct.App. 1975) ("The words 'controlled

substances . . . contrary to law', used in the warrant have a definite meaning in that they refer to certain and definite lists of drugs and their derivatives. Nothing was left to the discretion of the officers"). **Hagler v. State**, 726 P.2d 1181, 1183 (Okl. Crim.App. 1986) (The description upheld was "certain controlled substances . . . consisting of narcotics, marijuana, hallucinogens, barbiturates and stimulants"). The logic employed in these cases is clearly applicable to the present warrant, therefore the term "controlled substance" was sufficiently particular to control police discretion.

Since the term "controlled substances" was sufficiently particular to support the warrant and subsequent search and seizure, the validity or invalidity

of the other terms in the warrant is immaterial. "[A]bsent a showing of pretext or bad faith on the part of police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution." **United States v. Fitzgerald**, 724 F.2d 633, 636-637 (8th Cir. 1983). See also, **Lebron v. Vitek**, 751 F.2d 311, 312 (8th Cir. 1985). Thus, where a search warrant establishes the necessary probable cause to search one distinct person or place but is insufficient to justify the search of another described therein, it has been held by a majority of circuit courts that the valid portion of the warrant may be severed and a search conducted in accordance with the valid portion of the warrant is proper. See, **United States v. Riggs**, 690 F.2d 298

(1st Cir. 1982) (adopting severance); **United States v. Christine**, 687 F.2d 749 (3rd Cir. 1982) (adopting severance); **United States v. Cook**, supra, 657 F.2d 730, 734-36 (5th Cir. 1981) (adopting severance); **United States v. Freeman**, 685 F.2d 942, 952-53 (5th Cir. 1982) (admitting evidence discovered in plain view during execution of the valid portions of a severed warrant); **Sovereign News Co. v. United States**, 690 F.2d 569, 576 (6th Cir. 1982) (adopting severance), cert. denied, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983); **United States v. Cardwell**, 680 F.2d 75 (9th Cir. 1982) (endorsing severance but holding warrant in question not susceptible of severance).

Considering that the warrant was valid as to justify the ensuing search for controlled substances, the only re-

maining question is whether the other articles were seized in plain view, within the scope of the search warrant. See, **Fitzgerald**, supra at 637. According to the record, the videotape, magazines, and tennis shoes were discovered in locations likely to contain controlled substances. Thus, the seizure of those articles clearly fell within the scope of the warrant in that they were discovered in the pursuit of specific items contained in the warrant. Based on the foregoing therefore, respondent's submit that petitioner's challenge to the specificity of the items described in the warrant is without merit.

Sufficiency of Affidavit Supporting Search Warrant

Appellant next argues that the search warrant was deficient because it was based upon an affidavit which lacked

any information as to the reliability of the sources of information (the victims) and as to dates when the alleged sodomy victims obtained their information and conveyed it to the officer. In this case, the affidavit was based upon information obtained directly from the victims. Specifically, the affidavit stated that:

> [A]ffiant states that he has reason to believe such goods are being secreted therein because: sodomy victim, Shaun Mack, and sodomy victim Gary Mack have stated to this office that at the above residents and in the aforementioned vehicle, Michael Lachterman had marijuana, pornographic material, and a large amount of money that was used to pay minors to attract them for sexual activity.

When an affidavit is based upon statements from the crime victim, the safeguards used to ensure reliability of the information contained therein are simply inapplicable. See, i.e. **Illinois v. Gates**, 462 U.S. 213, 242-245, 103 S.Ct. 2317, 2334-2335, 76 L.Ed.2d 527 (1989) (totality of the circumstances tested used to determine reliability of an informant); **Plant v. State**, 781 S.W.2d 245 (Mo.App. E.D. 1989). The concerns of reliability arise when hearsay statements of an informant are used, thus increasing the chances of reliance on a reckless and prevaricating tale. Id. Here, we are not dealing with the hearsay statements from a "mere informant". Rather, the affidavit was based on statements from the sodomy victim. Consequently, the concerns of relying on a reckless or prevaricating tale that

exist where a mere informant is involved is absent in this case.

Finally, petitioner contends, that the warrant was insufficient because it failed to specify the date upon which the victims obtained their information. In determining whether a warrant is "stale", the court must look at all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property seized". **United States v. Foster**, 711 F.2d 871, 878 (9th Cir. 1983), cert. denied 465 U.S. 1103, 104 S.CT. 1602, 80 L.Ed.2d 132 (1984). "Staleness", as used by petitioner has been interpreted to mean an unreasonable delay between the issuance of the warrant and it's execution. **United States v. McCall**, 740 F.2d 1331 (4th Cir. 1984). In this

case, police applied for the search warrant two days after the sodomy occurred. (See, Petitioner's statement of the case, at 3; Petitioner's Appendix D). There is no allegation or evidence that the execution of the warrant was delayed. Petitioner's only claim is that the warrant did not contain the dates on which the information was obtained.

In the first instance, the application's failure to state a date certain is not fatally defective since by the language of the application it is clear that those items sought were currently being secreted; i.e. " . . . is being used for the purpose of secreting". The use of present tense in describing the events indicates they were sufficiently timely, especially considering that the application was made only two days after

the sexual assault occurred. See, i.e. **Guzewicz v. Slayton**, 366 F.Supp. 1402 (E.D. Va. 1973); **Borras v. State**, 229 So.2d 244 (Fla. 1969); **Walker v. State**, 140 Ga.App. 418, 231 S.E.2d 386 (1976); **State v. Hennon**, 314 N.W.2d 405 (Iowa 1982); **State v. Boudreaux**, 304 So.2d 343 (La. 1974); **Commonweath v. Atchue**, 393 Mass. 343, 471 N.E.2d 91 (1984); **State v. Anderton**, 668 P.2d 1258 (Utah 1983); **State v. Clay**, 7 Wash.App. 631, 501 P.2d 603 (1972). Simply because the warrant did not contain the dates of the assault would not render it invalid since the Magistrate may consider all the facts and circumstances of the case, **Foster**, supra, at 878, in deciding whether to issue the warrant.

In any event, assuming the warrant did not indicate timeliness, such does not render it invalid since the nature

of the crime, sodomy, did not require chronological specificity. As recognized by Missouri Courts, time is not of the essence in sexual crimes. **State v. Hoban**, 738 S.W.2d 536 (Mo.App. 1987); **State v. Meyers**, 770 S.W.2d 312 (Mo.App. 1989). Thus, because the instrumentalities which may be used in sodomy are not of an extinguishable nature, timeliness is not imperative. In this case, the items sought, pornographic material, controlled substances, and other instrumentalities of the crime were believed to be stored in plaintiff's home. These items were identified by the victims as items used to enhance his gratification during the sexual acts. Since according to the victims, the sexual encounters were continuing in nature, there was no reason to believe these items would have been destroyed or consumed. Therefore,

the failure to identify a date certain in the warrant application did not render it fatally defective.

!

Conclusion

In view of the foregoing, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

JOHN M. MORRIS, III
Assistant Attorney General
Counsel of Record

ANDREA K. SPILLARS
Assistant Attorney General
of Counsel

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(314) 751-3321

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that three true and correct copies of the Brief of Respondent in Opposition to Petition in the case of **State of Missouri v. Michael Lachterman**, was mailed, pursuant to Supreme Court Rule 28.5(b), postage prepaid, this 23rd day of March, 1992, to:

Irl B. Baris
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102

JOHN M. MORRIS, III

No. 91-1014

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Respondent.

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Respectfully submitted,

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In this case, the terms used to describe the items to be seized were sufficient under the circumstances.[2] However, assuming, only for purposes of argument, that the terms "pornographic material" and "instrumentalities of the crime of sodomy" were insufficient the fact remains that authorization to search for "controlled substances" was sufficiently particular to eliminate unnecessary discretion on the part of searching officers. The term "controlled substance" is a term used to designate the class of substances which are prohibited under Chapter 195, Missouri Revised Statutes (amended 1989). Specifically, the term "controlled substance" as designated in that chapter "means a drug, substance, or immediate precursor in Schedules I through V listed in this chapter". § 195.010(6), RSMo 1986. These schedules set forth the specific drugs which fall within the statute's purview, and therefore constitute "controlled substances". The term "controlled substances" there-

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Since the term "controlled substances" was sufficiently particular to support the warrant and subsequent search and seizure, the validity or invalidity of the other terms in the warrant is immaterial. "[A]bsent a showing of pretext or bad

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videotape, magazines, and tennis shoes were discovered in locations likely to contain controlled substances. Thus, the seizure of those articles clearly fell within the scope of the warrant in that they were discovered in the pursuit of specific items contained in the warrant. Based on the foregoing therefore, respondent's submit that petitioner's challenge to the specificity of the items described in the warrant is without merit.

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Finally, petitioner contends that the warrant was insufficient because it failed to specify the date upon which the victims obtained their information. In determining whether a warrant is "stale", the court must look at all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property seized". **United States v. Foster**, 711 F.2d 871, 878 (9th Cir. 1983), cert. denied 465 U.S. 1103, 104 S.CT. 1602, 80 L.Ed.2d 132 (1984). "Staleness", as used by petitioner has been interpreted to mean an unreasonable delay between the issuance of the warrant and it's execution. **United States v. McCall**, 740 F.2d 1331 (4th Cir. 1984). In this case, police applied for the search warrant two days after the sodomy occurred. (See, Petitioner's statement of the case, at 3; Petitioner's Appendix D). There is no allegation or evidence that the execution of the warrant was delayed. Petitioner's only claim is that the warrant did not contain the dates on which the information was obtained.

In the first instance, the application's failure to state a date certain is not fatally defective since by the language of the application it is clear that those items sought were currently being secreted; i.e. " . . . is being used for the purpose of secreting". The use of present tense in describing the events indicates they were sufficiently timely, especially considering that the application was made only two days after the sexual assault occurred. See, i.e. **Guzewicz v. Slayton**, 366 F.Supp. 1402 (E.D. Va. 1973); **Borras v. State**, 229 So.2d 244 (Fla. 1969); **Walker v. State**, 140 Ga.App. 418, 231 S.E.2d 386 (1976); **State v. Hennon**, 314 N.W.2d 405 (Iowa 1982); **State v. Boudreaux**, 304 So.2d 343 (La. 1974); **Commonweath v. Atchue**, 393 Mass. 343, 471 N.E.2d 91 (1984); **State v. Anderton**, 668 P.2d 1258 (Utah 1983); **State v. Clay**, 7 Wash.App. 631, 501 P.2d 603 (1972). Simply because the warrant did not contain the dates of the assault would not render it invalid since the Magistrate may consider all the facts and circumstances of the case, **Foster**, supra, at 878, in deciding whether to issue the warrant.

In any event, assuming the warrant did not indicate timeliness, such does not render it invalid since the nature of the crime, sodomy, did not require chronological specificity. As recognized by Missouri Courts, time is not of the essence in sexual crimes. **State v. Hoban**, 738 S.W.2d 536 (Mo.App. 1987); **State v. Meyers**, 770 S.W.2d 312 (Mo.App. 1989). Thus, because the instrumentalities which may be used in sodomy are not of an extinguishable nature, timeliness is not imperative. In this case, the items sought, pornographic material, controlled sub-

stances, and other instrumentalities of the crime were believed to be stored in plaintiff's home. These items were identified by the victims as items used to enhance his gratification during the sexual acts. Since according to the victims, the sexual encounters were continuing in nature, there was no reason to believe these items would have been destroyed or consumed. Therefore, the failure to identify a date certain in the warrant application did not render it fatally defective.

Conclusion

In view of the foregoing, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

JOHN M. MORRIS, III
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of Counsel

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that a true and correct copy of the Brief of Respondent in Opposition to Petition in the case of **State of Missouri v. Michael Lachterman**, was mailed, pursuant to Supreme Court Rule 28.5(b), postage prepaid, this _____ day of March, 1992, to:

Irl B. Baris
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102

JOHN M. MORRIS, III